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Testimony before the Senate Committee on Indian Affairs
Oversight Hearing on Fixing the Federal Acknowledgment Process

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On behalf of the Indian Legal Clinic at the Sandra Day O'Connor College of Law at Arizona State University ("Clinic"), we thank you for the opportunity to present testimony on the federal acknowledgment process ("FAP").

In April 2008, the Clinic provided a preliminary analysis ("Report") of the FAP to the Senate Committee on Indian Affairs ("Committee") in conjunction with an Oversight Hearing on Recommendations for Improving the Federal Recognition Process. Current Clinic students are revising the Report and have prepared this analysis in support of those revisions. I would like to recognize those students who have assisted in the preparation of this testimony and the revised report that will be submitted to the Committee: Derrick Beetso, Daniel Lewis, Rebecca Ross, and Vanessa Verri.

I. Introduction: The Federal Acknowledgment Process Faces Systemic Problems

The Clinic's Report identified four key issues that must be addressed to reform the FAP and to alleviate the systematic problems that have plagued the recognition process for three decades. The Clinic narrowed the issues into four categories:

1. Increased burden on petitioners;
2. Timeliness of the process;
3. Lack of resources, both for OFA staff and petitioners; and
4. Lack of transparency.

Any reform must address the four issues outlined above. Within thirty-one years, the FAP has resolved forty-five petitions. During this time period, the burden for the meeting the acknowledgment criteria has increased and the standards have changed.

In addition to the increased burden, the process is not efficient and is underfunded in all aspects. The backlog in petitioners results partly from the lack of funding to fully staff an acknowledgment office, lack of funding and assistance for petitioners to complete the process, and the increased evidentiary burdens on the process. The FAP anticipated and the Guidelines suggest that petitioners can complete petitions without assistance from experts.[1] However, due to the shifting standards and increased burden, petitioners need experts to navigate the process and to prepare their petitions.

The amount of time, evidence, and resources necessary to prepare and submit a documented petition has increased since the adoption of the FAP. There exist few resources to assist a petitioner in preparing a petition so that a tribe could fail to meet the criteria by its inability to provide the appropriate documentation and analysis. This lack of funding to petitioners also impacts the efficiency of the review process by OFA because of the additional time it takes to review information that is not compiled, organized, and analyzed in a professional manner.

[1] *See* OFA, Official Guidelines to the Federal Acknowledgment Regulations 17-24 (1997).

The current process is adjudication without the benefit of discovery or the questioning of experts relied on by OFA to issue its decisions. Proposed Findings and Final Determinations issued by OFA are legal decisions relying on legal standards, and the agency is given great deference in interpreting and applying the regulations to each petitioner.

Increased transparency is needed to allowing for better exchange of information to petitioners. Under the current system, petitioners must submit FOIA requests to obtain copies of their documents or any documents in their files. Petitioners and third parties should be able to obtain copies of the FAIR database in a timely manner without submitting FOIA requests. Once documents are uploaded onto the FAIR database, the nonprivate information should be segregated, and copies of the cd-roms should be able to be copied and provided at minimal cost.

II. Reforming the Federal Acknowledgment Process: Alternatives

To fix the process, Congress has options—(1) encourage the Assistant Secretary to create additional guidance addressing certain key issues; (2) pass legislation directing OFA as to its responsibilities, including definitions of the petitioner's burden, the evaluative standards, and funding for petitioners; (3) create a commission to either replace or assist the OFA in the evaluation process; (4) allow Administrative Law Judges to review and render acknowledgment decisions; (5) implement sunset provisions at various stages of the process to ensure that timeframes are respected; or (6) take no action and allow OFA to continue administering the FAP according to its existing procedures.. Numbers 3-5 require substantial funding allocations.

An analysis of the various options follows. The options include the adoption of minimum reforms that address the most pressing and significant problems faced by the acknowledgment process.

a. Make no Changes to the Current Process

The Assistant Secretary-Indian Affairs ("AS-IA") has the authority to issue guidance and direction to OFA professional staff to improve internal procedures in a way that addresses the transparency, timeliness, lack of adequate funding, and burden on the petitioner problems that are systemic in the OFA process. Such guidance and direction allows the AS-IA to improve the process by utilizing the existing statutory and regulatory framework.

In May 2008, AS-IA Artman published "Office of Federal Acknowledgment: Guidance and Direction Regarding Internal Procedures,"[2] ("Guidance") to "assist in making the Office of Federal Acknowledgment process more streamlined and efficient, and improve the timeliness and transparency of the process." The Guidance is limited in its function; it clarifies internal procedures and interprets existing regulations but does not (and cannot) create new regulations for the OFA to follow. Given its limited function, the

[2] 73 Fed. Reg. 30,146 (May 23, 2008).

Guidance aims to improve the OFA process by utilizing the existing legal framework. While the Guidance is a step in the right direction, it is insufficient to bring about the type of reform necessary to ensure a sustainable, workable process that fairly and efficiently evaluates petitions for federal acknowledgment in a timely manner.

i. What the 2008 Guidance Does Right to Address Problems in the Acknowledgment Process

The Guidance provides that reference to "first sustained contact" in the OFA regulations under 25 C.F.R. § 83 ("Regulations") can be interpreted to mean contact on or after March 4, 1789, the date the United States Constitution was ratified.[3] The Guidance recognized that the purpose of an historical accounting of the tribe's self-governance is to demonstrate that such tribe is "entitled to a government-to-government relationship with the United States."[4] For this reason, the Guidance eases petitioners' burden of persuasion by providing that a reasonable interpretation of the regulations requires that petitioners demonstrate "continuous tribal existence only since the formation of the United States."[5] This is a positive change that reduces the burden on petitioners as to the amount of research that needs to be conducting to meet the criteria.

Acknowledging the backlog of pending petitions waiting OFA review, the Guidance attempts to clear the backlog in three ways. First, if a political controversy erupts between different factions of the same petitioning tribe, OFA is permitted to suspend their petition until the controversy is resolved or one faction demonstrates actual political control.[6] Second, the Guidance expands the ability of OFA to expedite denials, clarifying when this process is triggered before a petition is on the "Ready, Waiting for Active Consideration" list ("Ready List"),[7] and the allowing an expedited denial after placement on the Ready List for failure to meet any of the evidentiary criteria outlined in 25 C.F.R. § 83.7.[8] Third, OFA may move petitions to the top of the Ready List if, after a preliminary review, the petition meets the criteria set forth in 25 C.F.R. § 83.7(e)- (g),[9] and the petitioning group can demonstrate either residence on an "Indian reservation continuously for the past 100 years," or that its members "voted in a special election called by the Secretary of the Interior under section 18 of the Indian Reorganization Act between 1934 and 1936, provided that the voting Indian group did not organize under the IRA."[10]

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[3] *Id.* at part V.
[4] *Id.*
[5] *Id.*
[6] *Id.* at parts I, II.
[7] *Id.* at part VI.
[8] *Id.* at part VII.
[9] 25 C.F.R. § 83.7(e) requires that members of the petitioning group "descend from a historical Indian tribe." Section 83.7(f) requires that members be composed principally of persons who are not members of any acknowledged North American Indian tribe." Section 83.7(g) mandates that the petitioning group is not the subject of congressional legislation that has expressly terminated or forbidden the federal relationship."
[10] 73 Fed. Reg. 30,146, at part IV.

It is unclear whether petitions qualifying for priority placement at the top of the Ready List would be evaluated before petitions already pending on that list. If that is the case, then these petitioners jump ahead of petitioners who have already completed their petition submission and are waiting for OFA's review. As of September 22, 2008, there were nine petitioners on the Ready List, four of whom have been on the list for over ten years, and four others who have been on the list for over six years.[11]

The Guidance takes some, but ultimately insufficient, steps toward transparency in the OFA process. The Guidance requires OFA to set forth the "evidence, reasoning, and analyses that form the basis" for its expedited proposed finding against acknowledgment when a petition fails on at least one of the seven criteria.[12] This detail potentially assists a petitioner who seeks to reverse the finding after accumulating more persuasive evidence. As discussed in more detail in part II(b)(i) below, the standards used by OFA are not adequately identifiable or defined, leaving petitioners at a significant disadvantage in the acknowledgment process.

Additionally, OFA maintains a website at http://www.bia.gov/WhoWeAre/AS-IA/OFA/index.htm where it publishes several documents including a draft Precedent Manual from 2002 and Official Guidelines prepared in 1997. There are also additional documents providing updates and status summaries of pending petitions through September 22, 2008.

Despite the steps taken by the Guidance and the OFA website, OFA must take additional steps to shed light on the acknowledgment process and the standards it uses to make acknowledgment determinations. Significant problems related to funding, transparency, timeliness, and the burden on petitioners continue to undermine the acknowledgment process. Accordingly, the Clinic sets forth below five proposals the Committee should consider when determining how to reform the OFA process. The proposals can also be combined to provide greater reform.

b. Adopt Changes Representing the Bare Minimum Required to Begin Reforming the Federal Acknowledgment Process

There are several changes that, if implemented, could address the core problems plaguing the OFA process. First among the changes needed is a clear definition of "reasonable likelihood," the standard used by OFA to evaluate the sufficiency of evidence supplied by petitioners. The burden on petitioners could also be improved if OFA created realistic timeframes for processing petitions, allowed petitioners to establish a sufficient historical record of continuous tribal existence from the date of statehood, and improved the discovery process for petitioners.

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[11] *See* Status Summary of Acknowledgment Cases (Sept. 22, 2008), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf.

[12] 73 Fed. Reg. 30,146, at part VII.

i. Define the Burden of Persuasion, "Reasonable Likelihood," to Ensure Consistency in the Acknowledgment Process

The OFA regulations ("Regulations") provide that "a criterion shall be considered met if the available evidence establishes a *reasonable likelihood* of the validity of the facts relating to that criterion."[13] What does that mean?

"Reasonable likelihood" is a degree of belief for evaluating a petition for federal acknowledgment by an Indian tribe. In general, several degrees of belief exist for different types of legal issues. "Beyond a reasonable doubt" is probably the most familiar. This standard is commonly used in criminal trials. "Beyond a reasonable doubt" is the strongest degree of belief to prove because a criminal defendant requires stronger protections due to the personal liberties at stake.[14] If we imagine no reasonable doubt exists that point X is true, we begin to understand the strength of "beyond a reasonable doubt." For instance, we might say you must be 90-95% convinced by the evidence. Compare that level to another commonly used standard, "clear and convincing evidence."

Clear and convincing evidence is "the degree of proof that produces . . . a firm belief or conviction as to the truth of the allegations."[15] Clear and convincing evidence is required to terminate a parent's rights concerning his children.[16] This strong degree of belief is necessary to protect the parent and child from such drastic measures.[17] However, "clear and convincing" is not as high a burden as "beyond a reasonable doubt."[18] We might say, for comparison, that one must be 75% convinced by the evidence under this standard.

The next degree of proof commonly used is "a preponderance of the evidence." This standard, used in most civil cases, is a lower degree of proof than "clear and convincing."[19] This standard is quite low and only requires the "greater weight of the evidence."[20] In comparison to the other standards, we can say one must be 51% convinced that the point is true.[21]

In order to develop a workable understanding of the standard used in the federal recognition process, we must establish what relationship "reasonable likelihood" has to "beyond a reasonable doubt," "clear and convincing evidence" and "preponderance of the evidence."

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[13] 25 C.F.R. § 83.6(d) (emphasis added).
[14] *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2548 (2009).
[15] *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 515-16 (1990) (citing an identical standard from *Cross v. Ledford*, 161 Ohio 469, 477 (1954)); see also *Smith v. Texas Dept. of Protective and Regulatory Services*, 160 S.W.3d 673, 678 (Tex. App. 2005).
[16] *Smith*, 160 S.W.3d at 678.
[17] *Id*.
[18] *Akron Center for Reproductive Health*, 497 U.S. at 515-16 (citing *Cross*, 161 Ohio at 477(1954)); *cf. People in Interest of A. M. D.*, 648 P.2d 625, 631 (Colo.1982).
[19] *Id*.
[20] Black's Law Dictionary (8th ed. 2004).
[21] See *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997) (explaining that the "preponderance of the evidence" standard divides the risk of litigation equally between two parties).

The "reasonable likelihood" standard was in common usage when the Supreme Court decided *Boyde v. California*.[22] The Supreme Court stated that "reasonable likelihood" does not rise to the level of "more likely than not."[23] "More likely than not" is nearly the same as the 51% degree of belief needed under the "preponderance of the evidence" standard.[24] Thus, "reasonable likelihood" must be something less than 51% in our comparison. As former Assistant Secretary of Indian Affairs Kevin Gover stated, this burden of proof standard is quite low.

A literal interpretation of 25 C.F.R. § 83.6(d) establishes, first, that the OFA, the decision makers, only look to the available evidence. Available evidence is the material provided by the petitioners to the OFA for review and any additional evidence obtained or submitted to the OFA. Next it establishes that this available evidence, when carefully examined, creates a *reasonable likelihood* that the facts, relating to the criterion, are valid. The Regulations add, "[c]onclusive proof of the facts relating to a criterion shall not be required in order for the criterion to be considered met."[25] In other words, the Regulations do not require conclusiveness, or certainty, of the facts relating to the criterion considered, only a reasonable likelihood as to their validity. So what then, is "reasonable likelihood?"

The term "reasonable likelihood" is sometimes used to describe the burden of proof for eventually succeeding on the merits of a claim before a preliminary injunction is granted. The Supreme Court has said in *Mazurek v. Armstrong*, "[i]t is frequently observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion."[26] Likewise, federal recognition of Indian tribes is an extraordinary and drastic alteration of the political status of tribal governments. The Regulations outline seven criteria which must be met. If all seven criteria are met, the tribe has proven, by a clear showing, they should be recognized; much like a clear showing must be proven before preliminary injunctions are granted. But what then, is the "burden of persuasion" which the Supreme Court refers to in *Mazurek*?

In the preliminary injunction context, reasonably likelihood of success is a low threshold."[27] In *Ashcroft v. ACLU*, the Court said, "[i]n deciding whether to grant a preliminary injunction, a district court must consider whether the plaintiffs have demonstrated that they are likely to prevail on the merits."[28] Thus, if we examine how the Supreme Court determines likelihood to prevail on the merits, we might gain a better understanding of how to interpret the reasonable likelihood standard found in the Regulations.

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[22] *Boyde v. California*, 494 U.S. 370 (1990).
[23] *Boyde v. California*, 494 U.S. at 380; see also *Brecheen v. Oklahoma*, 485 U.S. 909, 911 (1988).
[24] *Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 137 n.9 (1997).
[25] *Id*.
[26] *Mazurek v. Armstrong*, 520 U.S. 968, 72 (1997).; CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE, § 2948 (2d ed. 1995).
[27] *Goodman*, 430 F.3d at 437. (emphasis added).
[28] *Ashcroft v. ACLU*, 542 U.S. 656, 66 (2004).

Ashcroft considered whether a district court's grant of a preliminary injunction was correct. That case involved whether the Child Online Protection Act ("COPA") violated the First Amendment. They affirmed the district court's decision saying:

> As the government bears the burden of proof on the ultimate question of COPA's constitutionality, respondents must be deemed likely to prevail unless the Government has shown that respondents' proposed less restrictive alternatives are less effective than COPA. Applying that analysis, the District Court concluded that respondents were likely to prevail. That conclusion was not an abuse of discretion, because on this record there are a number of plausible, less restrictive alternatives to the statute.[29]

Essentially, the court gives a hypothetical predetermination of their outcome, and this is sufficient to meet the burden of persuasion.

If we go back to the roots of the "reasonable likelihood" standard in *Boyde v. California*, we see that the standard is akin to the reasonable person standard, yet cast with a broader net. For example, the Supreme Court in *Boyde* stated:

> [t]his '"reasonable likelihood" standard . . . better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction.[30]

In that case the issue was "whether there [was] a *reasonable likelihood* that the jury . . . applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."[31] The Supreme Court stated in earlier decisions, the inquiry focused on "what a reasonable juror could have understood the charge to be."[32] The court was unsatisfied with this earlier standard and developed a reasonableness standard that looked at the totality of the situation and not at a hypothetical reasonable juror's perspective.

If this macro interpretation of the reasonableness standard is what we are left with, it presents us with a broad understanding of the burden of persuasion. In tort law, the reasonableness standard asks what a similar person, in like circumstances, would have done. If we apply this wording to the Regulations' definition of the burden of proof, the Regulations essentially ask whether the available evidence could reasonably be interpreted to validate the necessary facts to fulfill the criterion.

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[29] *Id*. at 701-2.
[30] *Boyde v. California*, 494 U.S. at 380.
[31] *Id*. (emphasis added).
[32] *Id*. at 378.

For example, the first criterion which must be demonstrated is whether the "petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900."[33] There are two elements which must be met: 1) the petitioner must be identified as an American Indian entity; and 2) the petitioner must have been identified as such, continuously, since 1900. The Regulations provide examples of documents which may be used to assist in proving the two elements of this criterion. If the available evidence could reasonably be seen to support both elements of this criterion, the criterion should be considered met, according to the Regulations. While this might seem like a low burden, this is balanced with the overall requirement that all seven criteria must be met in a similar manner. Ultimately, this interpretation of the burden places a great deal of responsibility in the hands of the OFA.

ii. OFA Should Create Realistic Timeframes for Processing Petitions

Timeliness in processing petitions has been a long-standing problem for OFA. The United States General Accountability Office ("GAO") evaluated OFA procedures, identifying the systemic timeliness problems plaguing the agency and acknowledging that a process designed to take two years is more likely to take four or more.[34] Some petitioners have been engaged in the OFA process for decades.[35] OFA publishes a document on its website offering a timeline for the acknowledgment process, indicating the optimistic scenario that the process could take as little as two years from filing a letter of intent for OFA to issue a final determination.[36]

The likelihood that any petitioner could file a letter of intent and receive a final determination regarding their petition is so remote, absent an expedited denial, that the information is not helpful to petitioners. What would be more helpful, and would shed more light on the internal procedures of the agency, would be a more realistic timeline that accounts for the backlog of pending petitions. Additionally, OFA should develop a clear plan with stated deadlines demonstrating how it will work through pending petitions to clear the backlog and publish this plan on its website, giving existing and future petitioners a more accurate estimate of the timing involved in getting a final determination.

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[33] 25 C.F.R. § 83.7 (1994).

[34] *See*, *e.g.*, U.S. GEN. ACCOUNTING OFFICE, INDIAN ISSUES: TIMELINESS OF THE TRIBAL RECOGNITION PROCESS (2001) (identifying the extensive timeliness issues faced by OFA in processing acknowledgment petitions); U.S. GEN. ACCOUNTING OFFICE, INDIAN ISSUES: TIMELINESS OF THE TRIBAL RECOGNITION PROCESS HAS IMPROVED, BUT IT WILL TAKE YEARS TO CLEAR THE EXISTING BACKLOG OF PETITIONS (2005) (acknowledging that "[w]hile [OFA] has taken a number of important steps to improve the responsiveness of the tribal recognition process, it still could take 4 or more years, at current staff levels, to work through the existing backlog of petitions currently under review").

[35] *See* Status Summary of Acknowledgment Cases (Sept. 22, 2008), *available at* http://www.bia.gov/idc/groups/public/documents/text/idc-001217.pdf.

[36] *See* General Timelines for 25 CFR 83 [sic] Acknowledgment Process (date of authorship unknown), *available at*: http://www.bia.gov/WhoWeAre/AS-IA/OFA/SuppRegDocs/index.htm.

iii. Allow Petitioners to Satisfy the Evidentiary Criteria under 25 C.F.R. § 83.7(b)-(c) by Providing Evidence of Continued Existence as an Indian Tribe from the Date of Statehood for the State in which the Tribe Resides or 1789.

The Guidance issued by AS-IA Artman in 2008, setting March 4, 1789 as the earliest date petitioners must show continued tribal existence, eases the burden on petitioners. However, many tribes in North America maintained a different relationship (or perhaps no relationship) with any other sovereign in 1789. For many tribal communities, especially those in the western United States, the beginning of a government-to-government relationship with the United States formed when the state in which they resided achieved statehood. Petitioners who are required to provide documentation prior to statehood may have problems accessing documents, those documents may be limited or may not exist, and documents they are able to access may be in a foreign language as they were prepared by a foreign sovereign. For these reasons, petitioners should be permitted to satisfy the evidentiary burden under 25 C.F.R. § 83.7(b)-(c) if they can demonstrate continued tribal existence from the date of statehood or 1789, whichever is later.

iv. Improve the Discovery Process for Petitioners, Making Access to the Administrative Record for a Petitioner's Case Accessible

Presently, a petitioner's access to the administrative record for their petition is difficult to obtain due to technology, bureaucracy, and expense. OFA began using an electronic database to store and manage the administrative documents for petitions (the "FAIR" database). FAIR is accessible to some petitioners, but not all, and no petitioner can access it without submitting a Freedom of Information Act ("FOIA") request to compel OFA to make the database available. Moreover, the documents in the administrative record for a petitioner's case are not made available to that petitioner without a FOIA request.[37] Following a FOIA request, the documents are made available and will be copied for the petitioner at a rate of $0.10 per page. Given the volume of documentation compiled for each petition, the expense for copies of the record can quickly run a petitioner thousands of dollars.

Instead of the current process limiting access to the administrative record, petitioners should be able to access the record for their case without the need for a FOIA request. Similarly, the FAIR database should be made available to petitioners for their case without having to submit a FOIA request. As an alternative to paper copies, a digital copy of the administrative record, published on a CD-ROM or provided through a secure

[37] Although OFA addresses sensitive issues requiring privacy for the parties involved, the difficulty and apparent unwillingness to offer more visibility into the administrative record sets OFA apart from other agencies that make an administrative record available to interested parties. *See*, *e.g.*, Nuclear Regulatory Commission, Review of [the Department of Energy's] Environmental Impact Statement for Yucca Mountain, http://www.nrc.gov/waste/hlw-disposal/reg-initiatives/review-envir-impact.html (last visited Nov. 2, 2009) (offering details regarding the application to construct a nuclear waste storage facility, including draft environmental impact statements, public comments relating to the project, and status updates regarding the agency's timeline for a determination).

website, should be available to petitioners at little to no cost. Lastly, the OFA website should provide an up-to-date compilation of prior precedents that guide new determinations, status summaries for all pending petitions published on an annual (if not more frequent) basis.

c. Congress Can Direct OFA Through the Adoption of Legislation

An alternative to replacing the OFA is for Congress to pass legislation outlining OFA's duties, and the criteria, burdens, and definitions for the FAP. Through this legislation, Congress can provide direction to the OFA regarding the evidentiary burdens and the standards for reviewing the determinations. Agencies have discretion in decision-making, but perhaps Congress should outline the issues and factors that can be taken into consideration for acknowledgment decisions. A reformed process could highlight regional issues that could be considered in evaluating criteria.

d. Establish an Independent Commission to Review and Render Acknowledgment Decisions

An independent commission could be created to replace the OFA. In doing so, all the abilities to review and recognize tribes seeking federal recognition would be transferred from OFA and the Bureau of Indian Affairs (BIA) to the independent commission. An example of this alternative can be found in the legislation introduced by Representative Faleomavaega ("Faleomavaega Bill"). The Faleomavaega Bill recommends the complete transfer of all federal acknowledgement capabilities from OFA to a seven person, appointed independent commission.[38]

i. Advantages Related to the Establishment of an Independent Commission

An independent commission would improve the federal recognition process in various ways. First, it would decrease the length of time to make a determination for or against acknowledgment. For instance, the Faleomavaega Bill categorizes petitions into several groups: expedited negatives, expedited positives, and non-expedited petitions.[39] The division of petitions would increase the speed with which the commission arrives at determinations. An independent commission could also establish time limits within which the commission must conduct preliminary hearings. In the case of the Faleomavaega Bill, a preliminary hearing must be held within six months of the submission of a complete petition.[40] If the commission cannot make a determination for acknowledgement at the preliminary hearing, it must set a date for an adjudicatory hearing.[41] Within sixty days of the adjudicatory hearing, the commission must arrive at a determination for or against acknowledgement.[42] Should the commission fail to comply

[38] Indian Tribal Federal Recognition Administrative Procedures Act, H.R. 3690, 111th Cong. § 4(b) (2009).
[39] *Id.* at § 5 (c).
[40] *Id.* at § 8 (a) (1).
[41] *Id.* at § 8 (b).
[42] *Id.* at § 9 (d).

with these requirements, legislation could permit petitioners to bring actions in federal court for enforcement.

Second, an independent commission would likely address ongoing problems with the transparency of the decision-making process. This is mainly due to the fact that an independent commission would remove all recognition capabilities from the BIA, an agency that currently funds programs for federally recognized tribes and from which OFA's budget derives. An independent commission, with funding sources separate and apart from the BIA, would remedy the conflict of interests existing between funding for federally recognized tribes and tribes pursuing recognition. The independent commission could assure transparency in its decision-making process by making all records the commission relied upon in the preliminary hearing available to the petitioner. Petitioners could more readily request relevant documents since the independent commission would not be subject to the Freedom of Information Act. In addition, petitioners could have the opportunity to cross-examine acknowledgement and research staff during hearings about the commission's methodology and basis for decision.

Furthermore, the independent commission would have the power to create new regulations guiding the federal acknowledgement process should it so determine. Sunset provisions within legislation could set limits on the length of time for which the commission would operate. Establishing a finite time within which an independent commission could review petitions for acknowledgment could increase the efficiency of the process. In the case of the Faleomavaega Bill, the commission will terminate twelve years after the date of the commission's first meeting.[43]

ii. Disadvantages Related to the Establishment of an Independent Commission

The concept of an independent commission will not meaningfully address the problems with the current process unless the issue of funding is directly addressed. Under the Faleomavaega Bill, the only provisions that relate to providing financial assistance to petitioning tribes are competitive grants offered through the Secretary of Health and Human Services.[44] Moreover, it is also unclear the amount of funding the commission would receive to support a full staff of researchers. Without addressing the critical need for funding for petitioning tribes and for the operation of the independent commission itself, many of the major deficiencies within the current process will remain unresolved.

e. Appoint an Administrative Law Judge to Review and Render Acknowledgment Decisions, Expanding the Current Role of Administrative Law Judges in the OFA Process

Currently, OFA incorporates administration law judges ("ALJ") within its procedures for reconsideration of a final determination. The regulations provide that "the [Interior Board of Indian Appeals ('Board')] may require, at its discretion, a hearing conducted by

[43] *Id.* at § 4 (g).
[44] *Id.* at § 20 (a) (b).

an administrative law judge of the Office of Hearings and Appeals if the Board determines that further inquiry is necessary to resolve a genuine issue of material fact or to otherwise augment the record before it concerning the grounds for reconsideration."[45] The utilization of an ALJ occurs only during the process of reconsideration; and only at the discretion of the Board. Therefore, an ALJ review is not a guarantee.

OFA's website lists twenty-six IBIA decisions.[46] Of those twenty-six, the only petition which was reconsidered was the Schaghticoke Nation and this occurred after the Schaghticoke achieved recognition through the OFA process. A petition for reconsideration of their Positive Final Determination was filed by the State of Connecticut. The Schaghticoke was denied acknowledgment on October 15, 2005 as a result of that reconsideration.

During the reconsideration process, the legal burden of proof is higher than during the evaluation under the criteria by the OFA. The ALJ process for reconsideration is "preponderance of the evidence," meaning when all facts of evidence are gathered to prove a particular claim, it is either more likely than not, or it is likely not, that X is true. The exact language from the Regulations provides:

> (9) The Board shall affirm the Assistant Secretary's determination if the Board finds that the petitioner or interested party has failed to establish, by a preponderance of the evidence, at least one of the grounds under paragraphs (d)(1)-(d)(4) of this section.
>
> (10) The Board shall vacate the Assistant Secretary's determination and remand it to the Assistant Secretary for further work and reconsideration if the Board finds that the petitioner or an interested party has established, by a preponderance of the evidence, one or more of the grounds under paragraphs (d)(1)-(d)(4) of this section.[47]

The preponderance of the evidence standard is most often used in civil litigation. The threshold is lowered to more likely than not since the remedy is usually monetary in nature. Likewise, a tribe seeking reconsideration must prove that new elements, or administrative shortcomings during the recognition process, change the fact pattern in such a way that, if taken as a whole, it is more likely than not that reconsideration is appropriate.[48]

If the ALJ determines this burden is met, reconsideration is granted to the petitioner.

Schaghticoke appealed the reconsidered final determination claiming that the OFA was unduly influenced by politics during the reconsideration period.[49]

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[45] 25 C.F.R. § 83.11(e)(4).
[46] *Available at* http://www.bia.gov/WhoWeAre/AS-IA/OFA/IBIADocs/index.htm.
[47] 25 C.F.R. § 83.11(e)(9), and (e)(10)(1994).
[48] *Id.* at. § 83.11(d)(1-4).
[49] *Schaghticoke Tribal Nation v. Kempthorne*, Slip Op. No. 08-4735cv (2nd Cir., Oct. 19, 2009).

i. An Administrative Law Judge Addresses Concerns about Potential Conflicts of Interest under the Current Model

The current system of federal recognition creates an appearance that allowing the Bureau of Indian Affairs ("BIA") to decide questions of federal recognition presents a conflict of interest. While it may not be true, it seems plausible that there may be an incentive to deny applications for recognition since the BIA is also responsible for carrying out trust obligations for all recognized tribes.

Under an ALJ system, judges are intentionally separated from possible agency influence in order to ensure independent decisions. While stressing that there is no hard evidence to suggest the BIA's current process is tarnished by undue influence, a concession to an ALJ system, governed by the Administrative Procedures Act ("APA"), seems more objective on its face. The Supreme Court has described the administrative adjudicative process as follows:

> [T]he Administrative Procedure Act contains a number of provisions designed to guarantee the independence of hearing examiners. They may not perform duties inconsistent with their duties as hearing examiners. When conducting a hearing . . . , a hearing examiner is not responsible to, or subject to the supervision or direction of, employees or agents engaged in the performance of investigative or prosecution functions for the agency. Nor may a hearing examiner consult any person or party, including other agency officials, concerning a fact at issue in the hearing, unless on notice and opportunity for all parties to participate. Hearing examiners must be assigned to cases in rotation . . . . They may be removed only for good cause established and determined by the Civil Service Commission after a hearing on the record. Their pay is also controlled by the Civil Service Commission.
>
> In light of these safeguards, the risk of an unconstitutional act by one presiding at an agency hearing is clearly outweighed by the importance of preserving the independent judgment of these men and women. We therefore hold that persons subject to these restraints and performing adjudicatory functions within a federal agency are entitled to absolute immunity from damages liability for their judicial acts. Those who complain of error in such proceedings must seek agency or judicial review.[50]

This political insulation is necessary to afford tribes applying for recognition a fair and impartial process. The protection afforded ALJs in order for them to function independently is exactly what the federal government needs when making determinations about federal recognition of Indian tribes. An ALJ process, governed by the APA, significantly curtails any concerns over potential conflicts of interest.

[50] *Butz v. Economou*, 438 U.S. 478, 514 (1978).

ii. An Administrative Law Judge System Fails to Address the Need for Technical Analysis of Historical Documents

The current process requires seven criteria are met before recognition is afforded:

a) The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900.
b) A predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times until the present.
c) The petitioner has maintained political influence or authority over its members as an autonomous entity from historical times until the present.
d) A copy of the group's present governing document including its membership criteria. In the absence of a written document, the petitioner must provide a statement describing in full its membership criteria and current governing procedures.
e) The petitioner's membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity
f) The membership of petitioning group is composed principally of persons who are not members of any acknowledged North American Indian tribe.
g) Neither petitioner nor its members are the subject of congressional legislation that has expressly terminated or forbidden the Federal relationship.[51]

Under the FAP, the analysis is conducted by a "technical staff within the BIA, consisting of historians, anthropologists, and genealogists."[52] The technical staff is necessary because the findings often rely upon careful examination of historical documents. Currently, OFA reviews all of the documents submitted by petitioners. An ALJ system may not be able to conduct as careful an analysis as the current model for federal recognition. While an ALJ system can incorporate a framework more cognizant of appropriate legal standards, insulated from potential outside influence, it might also lack the technical expertise to appropriately analyze the historical documents many petitioners rely upon during the recognition process. Examples of such documents include historic marriage certificates, roll sheets, historic federal documents recognizing a petitioner's existence as a tribe, among others. If an ALJ system were to be used for determining federal recognition of petitioning Indian tribes, the current usage of historians, anthropologists, and genealogists should not be abandoned.

[51] 25 C.F.R. § 83.7 (1994).
[52] GAO, INDIAN ISSUES: BASIS FOR BIA'S TRIBAL RECOGNITION DECISIONS IS NOT ALWAYS CLEAR, GAO-02-936t, 4-5 (Sept. 2002).

While in a normal court setting, this would not be a problem because the parties can present experts and the Judge can weigh the evidence, petitioners who lack the resources to hire such experts may suffer a disadvantage under this process unless funding is appropriated to provide assistance to petitioners. Without this assistance, petitioners may fail to introduce and get the required evidence into the record so that the Judge can make a determination based on the available facts.

f. Congress Should Direct the Administration of Native Americans to Provide Funding for Acknowledgment Process or Funds for Petitioner Assistance

Funding is necessary for any efficient process, whether it is administered by OFA, a Commission, or an ALJ. There is currently no funding source for petitioners to prepare petitions for the FAP. Providing a funding source would not only improve the quality of the petitions, but it would improve the efficiency of the arbiter to review, analyze, and comment on the petition. In the past, the Department of Health and Human Services, Administration for Native Americans, provided grants for tribes petitioning for federal acknowledgment. This source of funding does not currently exist for the preparation of federal acknowledgment petitions. Thus, petitioners who lack resources, may fail to satisfy the evidentiary burden even if they could meet the criteria.

Instead of providing direct funding to Tribes for research assistance, another idea is to fund regional offices for petitioner assistance. These regional staff and experts could assist petitioners in preparing their petitions. In this way, both the OFA would have professional staff and the petitioner would have access to professional staff. Currently, most petitioners are poor and cannot afford to pay experts to assist in preparing the petition. By providing either grant opportunities or regional contract researchers, the playing field would be more balanced and facilitate a more efficient and fair review.

III. Summary of Alternatives for Reform

A. **Zero Action. Use the Guidance in 73 Fed. Reg. 30146 (May 23, 2008)**.

1. Evaluation of Guidance by the OFA to see whether it has enhanced the FAP.
2. Update OFA Status Summary regularly, include how the Guidance is improving, or hampering, the FAP.

B. Minimum and Easy Changes via new Guidance or Regulations.

1. Clarify definition of "reasonable likelihood" standard to reduce evidentiary burden on petitioners. Use the standard as defined by the U.S. Supreme Court.
2. Create realistic time frames:

a. Sunset provisions for preparing and evaluating petitions.
b. Reduced time period for petitioners' evidentiary burden: earliest period of contact should be limited to 1789 or statehood, whichever is later.

3. Increased access to digital copies of FAP records, including FAIR.
    a. Other agencies provide documents to interested parties.
    b. Allow petitioners to obtain copies of records without FOIA requests.
    c. Digital copies are more easily and cheaply redacted and copied.
    d. Allow access to FAIR database.
4. Better exchange of discovery between Agency and petitioners.
5. Establish teams of experts based on regions, e.g., Southeast, Northwest, Northeast, Southwest, Plains.
6. Require the FAP body to publish opinions clearly outlining agency precedent for FAP.
    a. Hearings must be on the record.
    b. Agency must follow its own precedent, and petitioners should be provided guidance for building a petition.

C. Congressional legislation directing reform of Acknowledgement Process.

1. Increased funding for OFA or other adjudicatory body.

2. Increased staff for OFA or other adjudicatory body.

3. Direct a federal agency, such as ANA, to provide special, non-competitive grant funding for petitioners.

4. Create regional petitioner assistance to level the playing field and provide experts that can help the efficiency and effectiveness of the process.

5. Require the Agency or Commission to use "reasonable likelihood."

6. Remove OFA from the Bureau of Indian Affairs.

7. Statutory implementation of **Alternative B**.

D. Completely replace the OFA with a Commission for Federal Acknowledgement.

1. A Commission for Federal Acknowledgment must:

a. Be well-funded and well-staffed so as not to suffer from the shortcomings of the Indian Claims Commission ("ICC").
b. Must include streamlined procedures and sunset provisions to reduce the timeframe for recognition or denial.
c. Have a transparent process including but not limited to hearings on the record and published opinions.
d. Abide by the "reasonable likelihood" standard of the U.S. Supreme Court. Must also clarify standard of review for appellate procedures.

2. Advantages include:
    a. Increased transparency for FAP due to reduced conflicts of interest.
    b. Decreased timelines for resolving petitions.
    c. Opportunity to cross-examine or question experts.
    d. Ability of Commission to take into account the totality of the circumstances to evaluate petitions.
3. Disadvantages, like those suffered by the ICC include:
    a. Political appointees may be inefficient and may lead the Commission astray.
    b. Lack of, or failure to implement, a permanent research staff in the Commission Act will decrease timelines.
    c. Appointees lacking Indian law or policy knowledge will be inefficient.
    d. Accumulation of records and information seen as progress by the Commission – a Commission should emphasize a results-oriented approach.
    e. Petitioners may be unequipped to present evidence in a Commission setting due to lack of resources.

E. **Completely replace the OFA with an administrative law judge ("ALJ").**
1. An ALJ can have the same qualities as a Commission. *See* **Alternative D**.
2. Advantages include:

a. Political separation from the BIA
b. Increased transparency due to open hearings on the record.
c. ALJ precedent controls subsequent proceedings, therefore producing a more stable FAP.
d. Discovery allows petitioner access to agency records.
e. ALJ relies on legal standards, thus reducing agency deference.
f. Legal proceedings have more definite timelines.

3. Disadvantages include:
    a. Speed of FAP not likely to increase because an ALJ may have a large docket to handle.
    b. Disadvantage to petitioners on appeal because petitioners must develop cases without evaluation or technical assistance from technical staff such as OFA. .
    c. A single ALJ will not be enough to handle the docket.

IV. Conclusion

Reform must address the four major issues impeding the current effectiveness of the OFA Process by (1) decreasing the burden on petitioners; (2) improving the timeliness of the process; (3) increasing resources available to the adjudicative body and the petitioners; and (4) increasing the transparency of the process.

The current regulations do not anticipate an end date by when petitioners can declare their intent to petition, and there is no timeframe by which petitions must be completed by the petitioners or evaluated by the OFA. Reform must include timeframes for initiating the petition process and provide for deadlines for the end of the process.

By adopting a regional approach to evaluating petitions, experts with familiarity in the region will enhance the ability to understand facts, work more expeditiously, and apply standards more even-handedly, thereby creating a more efficient process. This regional approach can be applied both the adjudicative process and for petitioner funding. Standards should take into consideration "available evidence" and how historical facts may impact the availability of this evidence.

Standards must be clarified and the burden must be reduced. Under a "reasonable likelihood" standard, circumstantial evidence should be allowed to make assumptions if there are limitations to the record. Transparency of the decision-making process and the exchange of documents will increase fairness and provide a better opportunity for the petitioner to prepare its case.